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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 663 Misc.

BOROUGH OF MOOSIC, *Petitioner*,

v.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA and UNITED STATES OF AMERICA, ET AL., *Respondents*.

PETITION FOR WRIT OF MANDAMUS OR CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, AND MOTION FOR LEAVE TO FILE, AND MOTION TO INCLUDE RECORD IN NO. 433, CITY OF POTTSVILLE V. UNITED STATES

GORDON P. MACDOUGALL
705 Ring Building
Washington, D. C. 20036
Attorney for Petitioner

Of Counsel:

CHRISTOPHER T. POWELL, *Solicitor*
Borough of Moosic
700 Mears Building
Scranton, Pa. 18503

ROBERT P. CASEY
FRANK J. MCDONNELL
200 Mears Building
Scranton, Pa. 18503

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IN THE

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No. Misc.

BOROUGH OF MOOSIC, *Petitioner,*

v.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA and UNITED STATES OF AMERICA, ET AL., *Respondents.*

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS OR CERTIORARI

Now comes petitioner Borough of Moosic, a municipality located in Lackawanna County, Pennsylvania, and respectfully moves this Court for leave to file the annexed petition for writ of mandamus or certiorari under Section 1651 of Title 28, United States Code, directed to the District Court of the United States for the Middle District of Pennsylvania, directing the

Honorable Francis L. VanDusen, C.J., Michael H. Sheridan and William J. Nealon, D.D.J. to show cause why a writ of mandamus should not be issued against them in accordance with the prayer of said petition, or in the alternative that this Court review the orders of the United States District Court for the Middle District of Pennsylvania entered July 11, 1967, July 28, 1967 and August 30, 1967 in No. 10054 Civil, *Borough of Moosic, et al.* v. *United States, et al.*, and for such other and further relief as may be just and proper.

GORDON P. MACDOUGALL
705 Ring Building
Washington, D. C. 20036
Attorney for Petitioner

Of Counsel:

CHRISTOPHER T. POWELL, *Solicitor*
Borough of Moosic
700 Mears Building
Scranton, Pa. 18503

ROBERT P. CASEY
FRANK J. MCDONNELL
200 Mears Building
Scranton, Pa. 18503

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BOROUGH OF MOOSIC, *Petitioner,*

v.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA and UNITED STATES OF AMERICA, ET AL., *Respondents.*

MOTION TO INCLUDE RECORD IN NO. 433, CITY OF POTTSVILLE V. UNITED STATES

Now comes petitioner Borough of Moosic, a municipality located in Lackawanna County, Pennsylvania, and respectfully moves this Court that the record of the United States District Court for the Middle District of Pennsylvania heretofore submitted with the appeal in No. 433, *City of Pottsville* v. *United States,*

be included by reference in its petition for writ of mandamus or certiorari.

GORDON P. MACDOUGALL
705 Ring Building
Washington, D. C. 20036
Attorney for Petitioner

Of Counsel:

CHRISTOPHER T. POWELL, *Solicitor*
Borough of Moosic
700 Mears Building
Scranton, Pa. 18503

ROBERT P. CASEY
FRANK J. MCDONNELL
200 Mears Building
Scranton, Pa. 18503

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OCTOBER TERM, 1967

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BOROUGH OF MOOSIC, *Petitioner*,

v.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA and UNITED STATES OF AMERICA, ET AL., *Respondents*.

PETITION FOR WRIT OF MANDAMUS OR CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, AND THE HONORABLE FRANCIS L. VAN DUSEN, MICHAEL H. SHERIDAN, AND WILLIAM J. NEALON, JUDGES FOR THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Borough of Moosic, a municipality located in Lackawanna County, Pennsylvania, prays that a writ of mandamus or certiorari issue to review the action of the United States District Court for the Middle District of Pennsylvania in staying all proceedings in No. 10054-Civil, *Borough of Moosic, et al.* v. *United*

States, et al., a single action which seeks to set aside two separate orders of the Interstate Commerce Commission (I.C.C.) dated June 9, 1967 and served June 12, 1967, approving and authorizing the merger of The Pennsylvania Railroad Company (PRR) and The New York Central Railroad Company (NYC) and requiring the inclusion of Erie-Lackawanna Railroad Company (E-L), The Delaware and Hudson Railroad Corporation (D&H) and Boston and Maine Corporation (B&M) into the Norfolk and Western Railway Company (N&W), and that the Supreme Court of the United States direct the said United States District Court for the Middle District of Pennsylvania to proceed forthwith to hear and to determine the said complaint of Borough of Moosic.

OPINIONS BELOW

The order of the District Court granting the motion of the United States and intervening defendants for a stay of further proceedings was entered July 11, 1967 and is reproduced herein in Appendix A.

The per curiam Memorandum Sur Motions of Defendant and Intervening Defendants for a Stay was entered July 13, 1967, and is reproduced herein in Appendix B.

The order of the District Court denying petitioner's Motion to Vacate Stay was entered July 28, 1967 and is reproduced in Appendix C.

The further order of the District Court denying petitioner's Motion to Vacate Stay of Proceedings and Establish A Briefing Schedule was entered August 30, 1967 and is reproduced herein in Appendix D.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1651(a). Exclusive appellate jurisdiction is conferred upon this Court by 28 U.S.C. Section 2325 and Section 1253 of actions to enjoin and to set aside orders of the I.C.C., and this writ is sought in aid of such exclusive appellate jurisdiction.

QUESTION PRESENTED

Whether the three orders of a three-judge District Court staying further proceedings in a single suit attacking two separate orders of the Interstate Commerce Commission, constitute an abuse of judicial discretion where

(a) The United States and Interstate Commerce Commission are in agreement that both I.C.C. orders are "inextricably intertwined", "wholly interrelated" and "completely intertwined";

(b) the suit pending in the District Court is the only suit in any court attacking both I.C.C. orders in a single consolidated proceeding;

(c) the pending action in the District Court is the only suit attacking the two I.C.C. orders on public interest grounds, and it is clear that such grounds are outside the scope of the litigation pending in other jurisdictions;

(d) petitioner could not intervene as of right in other jurisdictions and raise the issues presented by its suit, but brought its suit in the Middle District of Pennsylvania, the only forum provided by Congress for petitioner's suit (28 U.S.C. 1398); (See also: *New York Central R. Co.* v. *United States,* 200 F.Supp. 944 (S.D.N.Y. 1961).

(e) the stay order of the District Court, because of the procedural time-table in other forums, threatens to deny petitioner of effective judicial review;

(f) petitioner's suit is the only action in any court which places in issue the validity of what would constitute the largest corporate amalgamation in U.S. history;

(g) the stay of the District Court prevents judicial consideration of the fundamental and far-reaching question of the meaning of the public interest criteria of Section 5(2) of the Interstate Commerce Act (49 U.S.C. Section 5(2)).

STATUTES INVOLVED

The statutory provisions involved are 28 U.S.C. Section 1398, 28 U.S.C. 1651(a), 28 U.S.C. 2325 and 28 U.S.C. 1253, and are set forth herein in Appendix E.

STATEMENT

This petition for writ of mandamus or certiorari arises out of a conflict between railroad and non-railroad interests as to proper judicial review of two orders of the I.C.C. issued simultaneously on June 12, 1967. Certain railroads, particularly N&W, joined by the United States (U.S.) and I.C.C., have been successful in having the proposed PRR-NYC merger orders [1] litigated separately from the *N&W Inclusion* orders.[2] On the other hand, Moosic and other non-

[1] Pennsylvania R. Co.—Merger—New York Central R. Co., 330 I.C.C. 328.

[2] Norfolk & Western Railway Co. and New York, Chicago & St. Louis Railroad Co.—Merger, etc., 330 I.C.C. 780.

railroad plaintiff parties concerned with both I.C.C. orders issued simultaneously on June 12, 1967 have sought to have both I.C.C. orders litigated together simultaneously [3] in one consolidated proceeding.

Borough of Moosic was a party to the *N&W Inclusion* case before the I.C.C. That case involved the inclusion of E-L, D&H and B&M into N&W. Petitioner offered testimony and submitted exceptions. Moosic is served by E-L and D&H. It was not a party before the I.C.C. in the *PRR-NYC* case, initially reviewed by this court in *B. & O. R. Co.* v. *United States,* 386 U.S. 372 (1967).

Moosic became concerned with the proposed PRR-NYC merger only after the borough belatedly learned that the proposed merger was in part responsible for the petitions of E-L and D&H for inclusion in N&W. Moosic is a small municipality (pop. 5.500), is not served by PRR or NYC, and was not fully aware, at the time of its testimony in opposition to inclusion of E-L and D&H in N&W, that the proposed PRR-NYC merger was responsible for the proposed reduction or elimination of the competitive and independent status of E-L and D&H in the Moosic area.

The report of the Commission on remand in *PRR-NYC* was issued simultaneously on June 12, 1967 with *N&W Inclusion.* Borough of Moosic commenced its action against both I.C.C. orders by a single complaint filed June 26, 1967 in the United States District Court for the Middle District of Pennsylvania, the only court with venue provided by Congress where Moosic could

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[3] Consolidated judicial review was urged by the United States in its November 30, 1966 memorandum in *B. & O. R. Co.* v. *United States,* 386 U.S. 372 (1967).

bring its action.[4] It was joined by intervenors City of Scranton, City of Pottsville [5] and Milton J. Shapp on June 27, 1967. Hearing on petitioner's motion for an interlocutory injunction against both I.C.C. orders was set by the court for July 7, 1967.

However, the United States District Court for the Southern District of New York, upon the request of various railroads, on July 3, 1967 amended its April 28, 1967 order on mandate from the Supreme Court so as to enjoin the June 12, 1967 order of the I.C.C. in the *PRR-NYC* merger case. The July 3, 1967 memorandum order of the New York court is reproduced herein as Appendix F. On the morning of July 7, 1967, immediately prior to hearing on Moosic's motion for an interlocutory injunction, the I.C.C. voluntarily postponed the effective date of its order in the *N&W Inclusion* case. The actions of the New York Court and the I.C.C. thus mooted Moosic's application for an injunction.

After hearing on July 7, the United States District Court for the Middle District of Pennsylvania granted motions by defendant and intervening defendants [6] for a stay of further proceedings. The District Court's *per curiam* memorandum opinion, dated July 13, 1967,

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[4] 28 U.S.C. Section 1398, set forth in Appendix E herein.

[5] Pottsville's application for intervention was denied. See No. 433, *City of Pottsville* v. *United States*.

[6] Although PRR, NYC and the I.C.C. were the only intervening defendants at the July 7, 1967 hearing, special appearances and argument were made by E-L, D&H, N&W, City of Philadelphia and Commonwealth of Pennsylvania. Intervention was subsequently granted E-L and City of Philadelphia. Reading Company has filed its Southern District of New York papers with the Middle District of Pennsylvania court.

is set forth in Appendix B herein. The I.C.C. and U.S. represented to the Pennsylvania court in their joint memorandum in support of their motion for stay that the *PRR-NYC* and *N&W Inclusion* cases were "wholly interrelated", "completely intertwined" and "inextricably intertwined" and involved common issues, and urged that all litigation be conducted in New York.

Background of the New York Proceedings

Norfolk & Western Railway Company filed its suit to set aside the *N&W Inclusion* order June 13, 1967 in the United States District Court for the Western District of Virginia. On June 16, 1967 a meeting was held in New York City between counsel for the railroad parties, the I.C.C. and U.S., in chambers with the three judges who had heard the prior suit of *Erie-Lackawanna R. Co.* v. *United States,* 259 F. Supp. 964 (1966). This informal conference resulted in the issuance of two show cause orders for two motions. The first was the motion of N&W to amend the April 28, 1967 order of the New York court on mandate from the Supreme Court in *B. & O. R. Co.* v. *United States,* 386 U.S. 372, so as to embrace the June 12, 1967 order of the I.C.C. in the *PRR-NYC* case, 330 I.C.C. 328. The second motion was by PRR and NYC to require all parties to the earlier suit of September, 1966 to supplement their complaints or be dismissed with prejudice.

Replies to the Show Cause orders were submitted June 27, 1967 and a hearing was held June 28, 1967. The memorandum order of July 3, 1967 followed. This order contemplated that the *PRR-NYC* merger case would be heard in New York, and that the *N&W In-*

clusion case would be heard elsewhere. This memorandum order is set forth in Appendix F herein.

The First Stay Order

The U.S. and I.C.C. were participants to the June 16, 1967 conference in New York. Neither objected to having *PRR-NYC* heard in New York and *N&W Inclusion* heard in Virginia. Likewise, their respective pleadings in the New York court, submitted June 27, 1967, made no objection to splitting the two cases.

It was only after Moosic, on June 26, 1967, commenced its single action in one consolidated proceeding, that the U.S. and I.C.C. sought to bring all litigation to New York. The announcement of this intent was first made orally to the New York court at the June 28, 1967 hearing.

The U.S. and I.C.C. thereafter moved for a stay of all proceedings in the Pennsylvania and Virginia courts. The stay was granted in the Middle District of Pennsylvania by order entered July 11, 1967.[7]

The Second Stay Order

The Virginia court on July 14, 1967 ordered the parties to that action to file their briefs in *N&W Inclusion* in Virginia without prejudice to the New York *N&W Inclusion* action instituted by D&H.[8] In view

[7] The Virginia court on July 14, 1967 reserved the matter of a stay until September 26, 1967. (U.S.D.C.-W.D.Va., 67-C-51-R).

[8] Delaware & Hudson R. Co. v. United States (U.S.D.C.-S.D.N.Y., 67 Civ. 2451). D&H subsequently withdrew its brief. The earlier E-L "enforcement" action was apparently discontinued. Erie-Lackawanna R. Co. v. Norfolk & Western Ry. Co. (U.S.D.C.-S.D.N.Y. 67 Civ. 2362).

of the Virginia court's decision to proceed with a briefing and hearing schedule, petitioner on July 17, 1967 requested the Middle District of Pennsylvania to vacate its stay so as to likewise permit briefs in its consolidated action against the *PRR-NYC* and *N&W Inclusion* orders of the I.C.C.

On July 28, 1967, the Middle District of Pennsylvania denied petitioner's motion to vacate stay, mentioning the July 26, 1967 orders of the New York court, reproduced in Appendix G herein. It took notice that the New York court stated it would permit Moosic to intervene if Moosic desired to do so by August 2, 1967.

The Third Stay Order

The Pennsylvania court's original stay memorandum of July 13, 1967 provided that an application to modify the stay might be made after the August 8, 1967 briefs in *PRR-NYC* were submitted to the New York court. Accordingly, petitioner again sought to vacate the stay, but this was denied on August 30, 1967. This third order is set forth in Appendix D herein.

Petitioner thereupon concluded to petition the Supreme Court of the United States for a writ of mandamus or in the alternative for a writ of ceritorari under Section 1651 of Title 28 of the United States Code.

REASONS FOR GRANTING THE WRIT

1. The Supreme Court heretofore has expressed the desire that judicial review of the Eastern railroad unification proceedings be handled expeditiously. *B. & O. R. Co.* v. *United States,* 386 U.S. at 392. The action of the United States District Court for the

Middle District of Pennsylvania in staying further proceedings in the consolidated action of petitioner against the *PRR-NYC* and *N&W Inclusion* orders appears to negate the opinion in *B. & O. R. Co., supra.*

2. Petitioner is unable to secure relief in any District Court. Section 1398 of the Judicial Code (28 U.S.C. 1398) provides that civil actions to set aside orders of the I.C.C. shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action. The gratuitous invitation extended Moosic by the New York court to intervene in New York affords petitioner no remedy since the New York court split a single cause of action into a *PRR-NYC* component and into a *N&W Inclusion* component, with separate pleading, briefing and argument schedules.

There is a fundamental substantive difference between judicial review of *PRR-NYC* and *N&W Inclusion* separately, on the one hand, and judicial review of *PRR-NYC* and *N&W Inclusion* considered together in one consolidated proceeding, on the other hand. The railroad parties, particularly N&W, have strongly and successfully urged that *PRR-NYC* and *N&W Inclusion* be treated as separate proceedings for judicial review purposes. This is the case-by-case treatment of railroad unifications. Petitioner, however, would be prejudiced by such procedure since the adverse impact of *N&W Inclusion* must be considered as an integral part of any judicial review of *PRR-NYC,* and vice versa. The attention of the court is directed to the final pleading filed by Moosic seeking to vacate the stay of proceedings, reproduced herein in Appendix H.

The New York court in its July 3 and July 26, 1967 memorandum orders stated that it will first consider *PRR-NYC* and determine the validity of that order without reference to *N&W Inclusion.* The latter matter only will be considered as bearing upon *PRR-NYC* with respect to the timing of the consummation of *PRR-NYC.* A central core of Moosic's case is that the adverse impact of the inclusion required by *PRR-NYC* must be considered in determining whether the I.C.C. correctly found *PRR-NYC* to be in the public interest, or whether the I.C.C. should have held further hearings or should have itself consolidated the two proceedings.

Since the I.C.C. reports in *PRR-NYC* and *N&W Inclusion* were both served on June 12, 1967, it would seem especially appropriate that both matters should be consolidated for judicial review, at least with respect to the public interest aspects. See also *B. & O. R. Co.,* v. *United States,* 386 U.S. 372.

3. The issues presented in the Southern District of New York and in Virginia are completely different from those raised by petitioner in the Middle District of Pennsylvania. No party in the New York action is attacking the basic validity of the PRR-NYC merger. All parties there believe the merger to be in the public interest. It is only in petitioner's suit that the basic challenge is made to the I.C.C.'s construction of the public interest under Section 5(2) of the Interstate Commerce Act. 49 U.S.C. 5(2). The issues raised by the plaintiffs to the New York action concern financial terms and conditions. There are virtually no issues in common between the parties in New York and the parties in the Middle District of Pennsylvania.

Accordingly, there is no duplication of work for the two courts, and a resolution of the issues pending in New York will not aid disposition of petitioner's action in the Middle District of Pennsylvania.

4. The stay of proceedings in the Middle District of Pennsylvania until October 1, 1967 or until further order of that court, gives petitioner no assurance the Pennsylvania court will, in fact, ever establish a briefing schedule for the joint consideration of the *PRR-NYC* and *N&W Inclusion* orders. In view of the dismissal of petitioner's three separate efforts to get the case moving, it seems likely that the District Court will continue its stay pending review of the Southern District of New York orders by the Supreme Court of the United States.

5. The procedural history of the case, as set forth herein, demonstrates that this is the type of case for which the extraordinary relief of 28 U.S.C. Section 1651 was designed. In the context of this case, the action of the District Court effectively deprives Moosic of a remedy without reaching the point where a final order or interlocutory order has been issued which would warrant conventional appellate review. The stay order of the District Court stayed proceedings until October 1, until after the Southern District of New York has heard and determined the *PRR-NYC* merger case. There is no assurance that the Middle District of Pennsylvania will establish a briefing schedule on October 1, particularly since it is unlikely that the New York or Virginia courts will have completed *N&W Inclusion* by that date, and the problem remains of appeal from the New York and Virginia courts to the Supreme Court.

6. It is an abuse of judicial discretion for the District Court to refuse to hear the community public interest issues inherent in this case, and which are clearly outside the scope of the litigation in the other forums. These issues go to the heart of the meaning of the public interest standards specified by Section 5(2)(c) of the Interstate Commerce Act. Cf. *B. & O. R. Co.* v. *United States,* 386 U.S. 372, 444 (Douglas, J.). At the time of the District Court's last denial of petitioner's motion to vacate stay it was clear that petitioner's cause of action would not and, indeed, because of its very nature could not, be heard in any realistic sense in New York. (See Brief of Plaintiff and Intervening Plaintiffs to Vacate Stay, dated August 15, 1967, Appendix H herein).

7. The failure of the district court to proceed with petitioner's complaint, for all of the reasons enumerated above, constitutes an abuse of discretion within the meaning of the guidelines established in leading cases. *Landis* v. *North American Co.,* 299 U.S. 248 (1936); *Kansas City Southern Ry.* v. *United States,* 282 U.S. 760 (1931).

CONCLUSION

Petitioner prays that a writ of mandamus issue from this Court directed to the Honorable United States District Court for the Middle District of Pennsylvania, and to the Honorable Judges of said Court, requiring the Honorable Francis L. Van Dusen, Michael H. Sheridan and William J. Nealon to show cause on a day to be fixed by this Court why mandamus should not issue from this Court directing the said judges to hear and determine *Borough of Moosic, et al.* v. *United States, et al.,* No. 10054 Civil, pending in the

United States District court for the Middle District of Pennsylvania.

In the alternative, petitioner prays that a writ of certiorari issue to review the orders entered that stay further proceedings in *Borough of Moosic, et al.* v. *United States, et al.*, No. 10054 Civil, pending in the United States District Court for the Middle District of Pennsylvania.

Petitioner prays for such additional relief and process as may be necessary and appropriate in the premises.

Respectfully submitted,

GORDON P. MACDOUGALL
705 Ring Building
Washington, D. C. 20036
Attorney for Petitioner

Of Counsel:

CHRISTOPHER T. POWELL, *Solicitor*
Borough of Moosic
700 Mears Building
Scranton, Pa. 18503

ROBERT P. CASEY
FRANK J. MCDONNELL
200 Mears Building
Scranton, Pa. 18503

September 14, 1967

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BOROUGH OF MOOSIC, *Plaintiff*
MILTON J. SHAPP, ET AL., *Intervening Plaintiffs*

v.

UNITED STATES OF AMERICA, *Defendant*

and

INTERSTATE COMMERCE COMMISSION, ET AL.,
Intervening Defendants

Civil Action No. 10054

Order Sur Motions to Stay Further Proceedings

AND NOW, July 11, 1967, after consideration of the Motions of defendant and intervening defendants To Stay Further Proceedings, arguments presented on July 7, 1967, the Complaint of Intervening Plaintiffs Pennsylvania Communities filed in Erie-Lackawanna Railroad Company v. United States of America et al., Civil Action No. 66-2860 in the Southern District of New York, the Briefs and Memoranda filed by counsel, and the record, IT IS ORDERED that a stay of all proceedings is GRANTED until October 1, 1967, or further order of this court, with leave to any party or amicus curiae to apply for modification of such stay in the event that future circumstances justifying such modification develop.

FRANCIS L. VAN DUSEN, C. J.
MICHAEL H. SHERIDAN, J.
WILLIAM J. NEALON, J.

See Per Curiam Memorandum Sur Motion to Stay to be filed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 10054

BOROUGH OF MOOSIC, *Plaintiff*,
MILTON J. SHAPP and CITY OF SCRANTON, *Intervening Plaintiffs*,

v.

UNITED STATES OF AMERICA, *Defendant*,

and

INTERSTATE COMMERCE COMMISSION, NEW YORK CENTRAL RAILROAD COMPANY, and PENNSYLVANIA RAILROAD COMPANY, *Intervening Defendants.*

Before: Van Dusen, Circuit Judge, and Sheridan and Nealon, District Judges

Memorandum Sur Motions of Defendant and Intervening Defendants for a Stay

PER CURIAM July 13, 1967

This action seeks to enjoin permanently, set aside and annul these June 9, 1967 (served June 12) Orders of the Interstate Commerce Commission under 28 U.S.C. § 1336:

A. Pennsylvania Railroad Company-New York Central Company Merger 21989-90 (hereinafter I. C. C. Penn-Central merger proceedings)—see Appendix 1 to Complaint.

B. Norfolk & Western Railway Co. and New York, Chicago & St. Louis Railroad Co.—Finance Docket

21510 et al. (hereinafter I. C. C. N & W-Nickel Plate merger proceeding)—see Appendix 2 to the Complaint.[1]

This case is now before the court on motions of defendant and intervening defendants for a stay of all proceedings. The background of the I. C. C. proceedings and court cases leading up to the application for a stay of proceedings is summarized in *Erie Lackawanna Railroad Co.* v. *United States,* 259 F. Supp. 964 (S. D. N. Y. 1966); *B. & O. R. Co.* v. *United States,* 386 U.S. 372 (1967); *Erie-Lackawanna Railroad Company* v. *United States of America et al.,* . . . F. Supp. . . . (S. D. N. Y. 66 Civ. 2860, 2903 & 2914, Memorandum Order of 7/3/67).[2] On the morning of July 7, 1967, the I. C. C. postponed the effective date of the inclusion order covering the Erie-Lackawanna Railroad Company (E-L), Delaware and Hudson Railroad Company (D & H), and the Boston and Maine Corporation (B & M) in the I. C. C. N & W-Nickel Plate merger proceeding pending its decision on petitions for reconsideration of the June inclusion order in the N & W-Nickel Plate merger proceedings by B & M and D & H.

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[1] An order of the I. C. C. permitting the Chesapeake & Ohio Railway Co. (C & O) to control the Baltimore and Ohio Railroad Company (B & O), which "owns 38% of the voting control of the Reading Company which in turn controls" Central Railroad of New Jersey (see 386 U. S. 372, at 383), was sustained in *Brotherhood of Maintenance of Way Employees* v. *United States,* 221 F. Supp. 19 (E. D. Mich. 1963), aff'd. 375 U. S. 216 (1963). The C & O-B & O systems seek to merge with the N & W system into a single system, which has offered "to include" E-L, D & H, B & M, The Reading Company and CNJ "therein subject to various conditions" (see 386 U. S. 372 at 384).

[2] Related proceedings pending in the U. S. District Court for the Southern District of New York are Erie-Lackawanna Railroad Co. v. United States and Norfolk and Western Railway Co., No. 67 Civ. 2362, and Delaware and Hudson and Boston and Maine v. United States, No. 67 Civ. 2451.

These mergers have been considered by the I. C. C. as incident to what the Supreme Court of the United States has described as "the desire of the Congress that the industry proceed toward an integrated national transportation system through substantial corporate simplification." *County of Marin* v. *United States,* 356 U.S. 412, 417-8 (1958), which was quoted with approval in *B. & O. R. Co.* v. *United States,* 386 U.S. 372, 387 (1967).

The Supreme Court of the United States has emphasized the need for expedition of all litigation challenging the Penn-Central merger, using this language in *B. & O. R. Co.* v. *United States,* supra, at 392:

> "The Penn-Central merger has been studied for a decade. Indeed, the parties to the merger agreed to it over five years ago and it has been under Commission consideration ever since that time. This is, of course, the more reason for expedition. We note and give weight to the estimates of the Commission that the inclusion proceedings of the three roads in the N & W should be concluded in 'a relatively short time.' Our remand should, therefore, entail only a very short delay before the Commission. If its order is attacked in court the hearing there can be expedited, as was this one, and an early determination made."

At the hearing on the above Motion on July 7, the United States and the Interstate Commerce Commission stipulated of record that as defendants in the above-mentioned civil actions pending in the United States District Court for the Southern District of New York, they would make no objection to, and would welcome, the intervention of plaintiff in this action as an intervening plaintiff there prior to the July 17 deadline established by that court in its July 3 Memorandum Order and that, in the interests of prompt dispatch of the important federal judicial litigation, which is involved in this case, plaintiff's complaint should be considered by the above-mentioned New York

Federal Court. Trial counsel for the City of Scranton and Mr. Shapp, who have been active intervenors in the New York Federal Court since the inception of 66 Civ. 2860, is also one of counsel for plaintiff. An examination of the complaint filed in this action (VIII A on pages 5-10) discloses that it is virtually identical with the complaint of such intervening plaintiffs in 66 Civ. 2860 insofar as such complaints attack the Penn-Central merger. Subsections y-bb (four subparagraphs) of this Complaint, which are not in the Complaint in 66 Civ. 2860, challenge inclusion of the New Haven Railroad in the merger and the failure to consider reported earnings of Penn-Central for the first three months of 1967. No reason has been shown why these matters cannot be raised in 66 Civ. 2860 before July 17.

Also, many of the issues covered by this complaint may be covered by the scheduled final hearing to be held before the New York Federal Court on September 18, 1967. In the Memorandum Order of July 3, 1967, this language appears:

> "The Supreme Court made it clear that the issues of 'the validity of the merger, the special conditions of Appendix G, the modified order of the Commission, or the peripheral points posed by the various parties,' *ibid.*, remained for final determination in this actions ... If the actions remain pending for the grant of relief which the N & W and its allies want, especially for what, as will hereafter appear, we consider relief that may go beyond the Supreme Court's mandate, they are pending for other purposes as well.
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> "Each plaintiff or intervening plaintiff in such actions shall file and serve on or before July 17, 1967 a supplemental complaint setting forth in what respects it objects to the order in F.D. No. 21989 as this now stands and *what further relief it seeks.* [Emphasis supplied.]

It is not clear exactly how many issues challenged by the attack made in VIII B and C (pages 10-12 of this complaint will be considered at the New York Federal Court's final hearing on September 18. However, the above-quoted language from the July 3 Memorandum Order makes it likely that most, if not all, of them will be so considered if they are raised in supplemental complaints or an intervening complaint filed by the plaintiff on or before July 17.[3] An application to modify the stay of proceedings in this case may be made, if appropriate, after August 8, when the supplemental complaints and briefs of the moving parties have been filed in the New York Federal Court cases. Also, it is noted that the basic attack in this complaint is on the Penn-Central merger and plaintiff contends the railroads in its Borough (E-L and D & H) were forced to apply to participate in the N & W merger by the Penn-Central merger proposal.

The venue language of 28 U.S.C. § 1398 does not preclude the granting of a stay in a proceeding to enjoin an order

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[3] In footnote 9 on page 949 of *New York Central Railroad Company* v. *United States*, 200 F. Supp. 944 (S. D. N. Y. 1961), it is noted that Professor Moore believes that an intervenor's complaint may expand the issues presented by the original plaintiff, even though that court reached a different conclusion on the facts of that case. It may be that avoidance of a multiplicity of suits concerning these two larger mergers will justify requiring a party such as this plaintiff to intervene both in the New York Federal Court as well as in the Virginia Federal Court (Norfolk and Western Ry. Co. v. United States, C. A. 67-C-51-R in W. D. of Va.—Roanoke Div.), since the actions in both those courts, which are more convenient to the litigants who produced most of the documents and records in the administrative proceedings being attacked, were instituted prior to this action. If parties such as plaintiff are required to litigate their challenges to administrative orders affecting large numbers of persons over large areas in one or two centrally located courts, it would seem likely that Professor Moore's rule would be applied at least in such cases. In any event, it may well be necessary to limit this action to matters which are not permitted to be raised in the New York Federal Court.

of the I.C.C. in view of this language of the Supreme Court of the *United States in Kansas City Southern Ry.* v *United States,* 282 U.S. 760, 763-4 (1931):

> "The question is thus one for the sound discretion of the District Court, in which such a suit is brought to determine whether it should be permitted to continue or proceedings therein should be stayed, pending the final outcome of an earlier suit for the same purpose, *to the end that there may not be a multiplicity of suits without substantial reason.* . . . [Emphasis added.]

Both the Supreme Court of the United States and the United States Court of Appeals for the Third Circuit have stated that the rule that "the court which first has possession of the subject must decide it" is "salutary." See *Smith* v. *McIver,* 22 U.S. 532, 535 (1824); *Crosley Corporation* v. *Hazeltine Corporation,* 122 F.2d 925, 929-930 (3rd Cir. 1941). In the latter case, Judge Maris used this language at page 930:

> "It is of obvious importance to all litigants to have a single determination of their controversy, rather than several decisions which if they conflict may require separate appeals to different circuit courts of appeals. No party has a vested right to have his cause tried by one judge rather than by another of equal jurisdiction. . . . The economic waste involved in duplicating litigation is obvious. Equally important is its adverse effect upon the prompt and efficient administration of justice. In view of the constant increase in judicial business in the federal courts and the continual necessity of adding to the number of judges, at the expense of the taxpayers, public policy requires us to seek actively to avoid the waste of judicial time and energy. Courts already heavily burdened with litigation with which they must of necessity deal should therefore not be called upon to duplicate each other's work in cases involving the same issues and the same parties."

Cf. *Popkins* v. *Eastern Airlines, Inc.*, 204 F. Supp. 426, 432-3 (E. D. Pa. 1962). See, also, authorities cited at pages 16-18 of defendant's Memorandum attached to its Motion To Stay Further Proceedings. In footnote 3 of the Memorandum Order of July 3, 1967, the New York Federal Court pointed out:

> "3. Once we entertained E-L's suit to enjoin the merger actions in other districts, seeking the same relief might well have been stayed by those courts on the United States' stipulating not to contest venue here. See Kansas City Southern Ry. v. United States, 282 U.S. 760, 763-64 (1931); New York Central R. R. v. United States, 200 F. Supp. 944, 950-51 (S.D.N.Y. 1961)."

For the foregoing reasons, a stay of all proceedings will be granted at this time until October 1, 1967 (approximately two weeks after the September 18 final hearing date) or further order of this court, with leave granted to any party or amicus curiae to apply for modification of such stay if future circumstances justify such application.

It is not necessary to rule at this time on defendant's suggestion that the stay provide that plaintiff's and intervenor-plaintiffs' complaints will be dismissed with prejudice if they do not seek to intervene or file supplemental complaints in the above New York Federal Court litigation.

Plaintiff and defendant are requested to give the court a report on the status of other litigation concerning the I. C. C. orders attacked in this case and of all court litigation concerning them no later than September 5, 1967.

In view of the terms of 28 U.S.C. §2323 and the statements in the record showing that the following are parties to the relevant I. C. C. proceedings, they have been permitted to intervene in this proceeding:

Milton J. Shapp, as a party plaintiff
City of Scranton, as a party plaintiff

New York Central Railroad Company, as a party defendant

Pennsylvania Railroad Company, as a party defendant

Interstate Commerce Commission, as a party defendant

However, all parties must recognize that the above-mentioned litigation was commenced in the New York and Virginia (footnote 3) Federal Courts before the institution of this suit and their rights may be affected if they do not seek to intervene promptly in one or both of those proceedings. Also, additional consequences may be applicable to Mr. Shapp and the City of Scranton if they fail to press their claims in the New York Federal Court since they have been parties to that proceeding for almost a year.

Since the City of Pottsville is not located in this District (28 U.S.C. §1398) and the defendant has objected to parties raising their objections to these I.C.C. Orders other than in the Southern District of New York, its application to intervene must be denied.

The application of the City of Philadelphia cannot be granted until it files and serves a copy of its proposed Answer to be attached to its Motion. See F. R. Civ. P. 24(c).

FRANCIS L. VAN DUSEN, C. J.
MICHAEL H. SHERIDAN, J.
WILLIAM J. NEALON

July 13, 1967

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(Filed July 28, 1967)

Civil Action No. 10054

BOROUGH OF MOOSIC, *Plaintiff*,

and

MILTON J. SHAPP and CITY OF SCRANTON,
Intervening Plaintiffs,

v.

UNITED STATES OF AMERICA, *Defendant*,

and

INTERSTATE COMMERCE COMMISSION, NEW YORK CENTRAL RAILROAD COMPANY, AND PENNSYLVANIA RAILROAD COMPANY, *Intervening Defendants*.

Order Sur Motion to Vacate Stay, Etc.

(Document 40)

AND NOW, July 27, 1967, after consideration of the above Motion To Vacate Stay (Document 40), the Reply of the United States of America and the Interstate Commerce Commission to such Motion (Document 45), the Objections of the Pennsylvania Railroad, et al. (Document 46), the Memorandum in Support of Such Motion with Appendices, the Memorandum in Reply to the Motion of the Delaware & Hudson Railroad Corporation (Document 48), the Orders of the U.S. District Court for the Southern District of New York entered July 26, 1967, in 66 Civ. 2860, 2903 and 2914, granting plaintiff and Pottsville the right to intervene and file complaints in those proceedings on or before August 2 the right to fill supplemental complaints by August

2 also being given to intervening plaintiffs) and in 67 Civ. 2451, joining the Norfolk & Western Railway Company as a party plaintiff and establishing a briefing schedule, and the record, It Is Ordered that the Motion to Vacate Stay of Further Proceedings and for an Order Setting a Schedule of Briefing Dates (Document 40) is Denied, except insofar as all parties to this action are directed to file with this court copies of all Pleadings, Motions, Memoranda and Briefs which they file in any of the pending actions in the United States District Courts for the Southern District of New York and the Western District of Virginia, mentioned on page 2 and in footnote 3 of the Memorandum filed in this case on July 13, 1967;

It Is Further Ordered that any party or amicus curiae has leave to apply for modification of the stay entered July 11, 1967, in the event that future circumstances justifying such modification develop.

FRANCIS L. VAN DUSEN, C. J.
MICHAEL H. SHERIDAN, D. J.
WILLIAM J. NEALON, D. J.

APPENDIX D

Order Sur Motion to Vacate Stay of Proceedings And to Establish A Briefing Schedule

And Now, August 30, 1967, after consideration of the Motion to Vacate Stay of Proceedings and To Establish A Briefing Schedule (Document 57), the Reply of the United States of America and the Interstate Commerce Commission to that Motion, being Document 64, Memorandum of the Pennsylvania Railroad Company and the New York Central Railroad Company In Opposition to Motion to Vacate Stay of Proceedings and To Establish A Briefing Schedule, being Document 65, the Memorandum in Support of the Order to Show Cause (Document 56), the injunction of July 3, 1966 (S.D.N.Y. 66 Civ. #2860, 2903 & 2914) providing that the orders in Finance Docket No. 21989-90 shall not be effective until September 1967, and the record, including the Second Supplemental Complaint of Reading Company (particularly paragraphs XIX et seq.) filed in 66 Civ. 2914 in July and in this court on August 14, brief of Reading Company filed in 66 Civ. 2860, 66 Civ. 2903 and 66 Civ. 2914 dated August 8, 1967, and filed in this court on August 14, 1967, It Is Ordered that the Motion To Vacate Stay of Proceedings and To Establish a Briefing Schedule (Document 57) is Denied.

Francis L. Van Dusen, C. J.
Michael H. Sheridan, J.
William J. Nealon, J.

APPENDIX E

Judiciary Act. Title 28, United States Code:

Section 1398.

Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

Section 1253

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Section 1651(a)

The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Section 2325

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the applicant therefor is heard and determined by a district court of three judges under section 2284 of this title.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

66 Civ. 2860

ERIE-LACKAWANNA RAILROAD COMPANY, Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

THE DELAWARE & HUDSON RAILROAD CORPORATION, CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, MILTON J. SHAPP, CITY OF SCRANTON and BOROUGH OF FREEDOM, and BOSTON & MAINE R.R. Co., Intervening Plaintiffs,

PENNSYLVANIA RAILROAD COMPANY, NEW YORK CENTRAL RAILROAD COMPANY, RICHARD JOYCE SMITH and WILLIAM J. KIRK, as Trustees for the New York, New Haven & Hartford Railroad Company, Debtor, Intervening Defendants.

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66 Civ. 2903

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, Plaintiffs,

v.

UNITED STATES OF AMERICA, Defendant.

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66 Civ. 2914

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and READING COMPANY, Plaintiffs,

v.

UNITED STATES OF AMERICA, Defendant,
WESTERN MARYLAND RAILWAY COMPANY,
Intervening Plaintiff.

Motions heard June 28, 1967 before FRIENDLY, C.J. and WEINFELD and LEVET D.JJ.

Cravath, Swaine & Moore, by Thomas D. Barr, and Alexander & Green, for plaintiff Erie-Lackawanna R.R.

Nixon, Mudge, Rose, Guthrie, Alexander & Mitchell, by Harry G. Silleck, Jr., for plaintiff Delaware & Hudson R.R.

Arthur Arsham, by Gordon P. McDougall, for intervening plaintiffs Milton J. Shapp, City of Scranton and Borough of Freedom.

Gerald E. Dwyer for intervening defendants New York Central R.R. and Conboy, Hewitt, O'Brien and Boardman for intervening defendant Pennsylvania R.R., by James B. Gray.

Howard E. Shapiro for defendant United States of America.

Robert W. Ginnane for defendant Interstate Commerce Commission.

Robert W. Peet and Sullivan & Worcester, by Joseph Auerbach, for Trustees of New York, New Haven & Hartford R.R.

Kelley, Drye, Newhall, Maginnes & Warren; Sidley & Austin by Howard J. Trienens; Wilmer, Cutler & Pickering; and Wheeler & Wheeler, for plaintiffs Norfolk & Western Ry., Baltimore & Ohio R.R., and Chesapeake & Ohio Ry. and intervening plaintiff Western Maryland Ry.

Richard J. Lally and Martin J. Flynn for Trustees of the Central Railroad Company of New Jersey, plaintiff.

Macklin, Hanan & McKennan, by William P. Quinn, for plaintiff The Reading Company.

Walter J. Myskowski, for State of New York, intervening defendant.

William J. Lynch, for State of Connecticut, intervening defendant.

Memorandum Order

By a supplemental report and order on reconsideration and further hearing in F.D. No. 21989, Pennsylvania Railroad Company — Merger — New York Central Railroad Company, 330 I.C.C. 328, served June 12, 1967, the Interstate Commerce Commission authorized consummation of the merger of the Pennsylvania Railroad Company (PRR) and the New York Central Railroad Company (NYC) on the effective date of the order, to wit, July 17, 1967; the order provided that if the authority therein conferred was not exercised within 180 days thereafter, it should be of no further force or effect. At the same time the Commission issued a further report and order in F.D. No. 21510, Norfolk & Western Ry. Co. and New York, Chicago & St. Louis Railroad Company—Merger, etc., directing inclusion of the Erie-Lackawanna (E-L), the Delaware & Hudson (D & H) and the Boston & Maine (B & M) in the Norfolk & Western (N & W). These rulings have precipitated a number of motions in these actions, have given birth to several new actions, and threaten to spawn still more. N & W has brought suit in the Western District of Virginia to enjoin enforcement of the inclusion order. E-L has brought an action in this court to enforce that order, which N & W has moved to dismiss; we are advised the ICC has moved in the Western District of Virginia for a stay of N & W's action in that court. The D & H and B & M, both of which have petitioned the I.C.C. for reconsideration of the terms of the inclusion order, have also sued in this court; they support the direction for their inclusion in the N & W but challenge the financial terms. The Borough of Moosic has brought an action in the Middle District of Pennsylvania to enjoin the orders both in the merger case and in the inclusion case; we are advised that the City of Pottsville has joined in that action and that Milton J. Shapp and the City of Scranton, intervening plaintiffs in these actions, have also intervened as plaintiffs therein. The Trustees of the Central Railroad of

New Jersey (CNJ), a plaintiff in one of the actions in this court, have informed us of their intention to urge the CNJ's objections to the PRR-NYC merger not in this court but in the District of New Jersey. The Reading Company, also a plaintiff here, intends to pursue a similar course either in the Eastern District of Pennsylvania or by intervention in some other suit, presumably the CNJ's. The B & O, C & O, N & W, and Western Maryland, plaintiffs or intervening plaintiffs here, also assert and presumably intend to pursue supposed rights to attack the merger order by new actions in what they term "a court of appropriate statutory venue," to wit, the district courts for Maryland, Northern Ohio, and Western Virginia. Such a proliferation of actions in many different courts is a far cry from the expedited and early determination of review proceedings to which a majority of the Supreme Court referred in reversing our denial of a temporary injunction, Baltimore & Ohio R.R. v. United States, 386 U.S. 372, 392 (1967); indeed, considered in the aggregate, it outruns even the fears of the four dissenters as to what may be done by "ingenious counsel bent on delay." 386 U.S. at 472.

I.

In an effort to introduce a modicum of order into so much of this chaos as relates to the Commission's supplemental order in the merger case, PRR and NYC have moved that we require each plaintiff or intervening plaintiff in the instant actions to file supplemental complaints setting forth the claims now made in the light of the Commission's supplemental report on reconsideration, direct that the complaint of any such party not so amending its complaint be dismissed with prejudice, and set a schedule for responsive pleadings, briefs and final hearing. There are several kinds of unfinished business in these actions. One concerns objections to the Appendix G protective conditions, now revised, whether on the ground of inadequacy from the standpoint of the three protected roads or on

the ground, previously urged by B & O, C & O, N & W, CNJ, the Reading, the Western Maryland, and C. & E.I., "that these provisions created a 'community of interest' between the protected roads" and the merged company which would produce additional diversion, see 259 F. Supp. at 970, 976; we have been told by counsel for the N & W and other plaintiffs that they regard the revised conditions as even worse in this respect. These railroads and possibly others apparently intend to argue also that the Commission's prescription of any protective conditions was inconsistent with a passage in the Supreme Court's opinion, 386 U.S. at 390. In addition certain special objections raised by C. & E.I., the Western Maryland, CNJ and the Reading are as applicable to the supplemental order on reconsideration as to those of 1966. Broadest of all is the objection of intervening plaintiffs Milton J. Shapp, the City of Scranton and the Borough of Freedom,[1] which assails the validity of the merger on a wide front. Inherent to all these is the question, raised by another motion discussed below, of extending the injunction against consummation until these issues have been decided.

The N&W, B&O, C&O, Western Maryland, the Trustees of the C.N.J., the Reading,[2] Shapp and the City of Scranton oppose the motion made by the Pennsylvania and the Central; the United States, the Interstate Commerce Commission, and the states of New York and Connecticut support it. The basic claim of the railroads opposing the motion is that the actions in this court have ended and that anyone seeking to attack the supplemental report and order on reconsideration may and indeed must do so in a new action in "a court of appropriate statutory venue"; the N&W and the railroads allied with it contend also that if the inclusion order is ultimately sustained and if the stockholders of the protected roads immediately accept, the pro-

[1] We are advised that the Borough of Freedom does not intend to participate further.

[2] The Reading has moved to "quash" the motion; we deny this.

tective conditions may never take effect and hence are not now ripe for review. Shapp and the City of Scranton also contend that the actions here have come to an end; they prefer to conduct their further attack on the merger by intervening in the suit just brought by the Borough of Moosic in the Middle District of Pennsylvania against both the merger order and the inclusion order rather than "in a distant and foreign forum..."

The parties opposing the motion are wrong in saying these actions have terminated. The subject of the complaints of the plaintiffs and intervening plaintiffs was the Commission's approval of the merger, as it then stood or as it might stand in the future. All that we had before us for decision last fall and the Supreme Court had before it on appeal, see 386 U.S. at 378, were motions for interlocutory relief, to wit, temporary injunctions of the merger pending the reconsideration the Commission had already granted; the actions could not proceed to final hearing until that had been completed. The Supreme Court made it clear that the issues of "the validity of the merger, the special conditions of Appendix G, the modified order of the Commission, or the peripheral points posed by the various parties," *ibid.*, remained for final determination in these actions after the Commission had made its supplemental order on reconsideration. Compare Texarkana v. Arkansas Louisiana Gas Co., 306 U.S. 188, 203 (1939); New York Central R.R. v. United States, 207 F. Supp. 483, 498 (S.D.N.Y. 1962). Indeed, the position taken by N&W and the roads associated with it in opposition to the motions of PRR and NYC contrasts rather strangely with their own request for further injunctive relief in the actions brought by them in this court. If the actions remain pending for the grant of relief which the N&W and its allies want, especially for what, as will hereafter appear, we consider relief that may go beyond the Supreme Court's mandate, they are pending for other purposes as well.

The idea that litigants challenging an order of a federal administrative agency may invoke the jurisdiction of one federal court, require it to expend its energies in becoming familiar with the subject-matter, obtain interlocutory relief against enforcement of the order, and then take their grievances to another federal court which they consider may be more favorable while their complaints remain pending for final disposition, does not commend itself in general; and surely this case, where expedition is so important, would be the last one in which to countenance proceedings of that sort. In re Georgia Power Co., 89 F.2d 218 (5 Cir.), cert. denied, 392 U.S. 692 (1937), sustaining a refusal to allow dismissal without prejudice and an injunction against a second suit, strongly supports our view. Whatever rights many of these plaintiffs initially had to sue elsewhere,[2] they brought their actions to enjoin the merger here, and any objections on the score of venue have long since been waived. The plaintiffs and intervening plaintiffs would have been surprised and rightly aggrieved if, in the event of their desiring to prosecute these actions in this court after the ICC's supplemental report on reconsideration, the United States had insisted that new process issue so that a venue objection could have been taken. Their reliance on New York Central R.R. v. United States, 200 F. Supp. 944 (S.D.N.Y. 1961), is wholly misplaced. The issue raised by the parties in that case was whether an action brought here should be transferred to the district court for Maryland under 28 U.S.C. §1404(a), and we held it could not be. Our remarks as to refusal of a stay of the action in this court must be read in the light of the facts

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[2] Once we entertained E-L's suit to enjoin the merger, actions in other districts seeking the same relief might well have been stayed by those courts on the United States' stipulating not to contest value here. See Kansas City Southern Ry. v. United States, 282 U.S. 760, 763-64 (1931); New York Central R.R. v. United States, 200 F. Supp. 944, 950-51 (S.D.N.Y. 1961).

that the New York interests had never invoked the jurisdiction of the District Court for Maryland, since they supported rather than opposed the orders the I.C.C. had initially issued, see 200 F. Supp. at 495; that the Maryland district court had taken final action, Baltimore & Ohio R.R. v. United States, 151 F. Supp. 258 (D. Md.), vacated 355 U.S. 175 (1957), and not merely granted interlocutory relief as has been done here; and, as this court noted, that the Maryland interests recognized this by bringing "an entirely new action" after the Commission's further order, see 200 F. Supp. 946 n.3. While obviously no plaintiff should be forced to litigate against his will, that does not mean that he is wholly free at his own volition to stop litigation in the court of his initial choice and begin again in another, regardless of the interests of other parties and the public interest. See F.R. Civ. P. 41(a)(2). Cf. Harvey Aluminum, Inc. v. American Cyanamid Co., 15 F.R.D. 14 (S.D.N.Y. 1953).

As to the argument concerning ripeness, while it is theoretically possible that the protective conditions may never need to be invoked, realism suggests the contrary. If the inclusion order is temporarily enjoined as N&W is asking in its suit in the Western District of Virginia, some time would necessarily elapse between that order becoming final and effectuation of the inclusion of each of the three roads. Stockholder assent can hardly be obtained until the terms become certain. And further problems might arise if inclusion of D&H and B&M were prevented by lack of stockholder approval on the part of E-L or, in the case of B&M, of either E-L or D&H. See Appendix F to Supplemental Report in F.D. No. 21510, General Terms and Conditions 1 and 2. Furthermore, as will hereafter appear, we are reserving the question how far, if we find the supplemental report and order in F.D. 21989 to be valid, we will extend the injunction during review of the inclusion order. In any event the Supreme Court's decision requires

that the parties and we should make whatever sacrifice there may be in what might turn out to have been an unnecessary task of reviewing the revised Appendix G conditions, and, as indicated, other questions remain unresolved.

We therefore set the three actions seeking to enjoin the orders in F.D. 21989 and 21990, to wit, 66 Civ. 2860, 2903 and 2914, including the complaints of intervenors, for final hearing on September 18, 1967, see F.R. Civ. P.65(a)(2). Each plaintiff or intervening plaintiff in such actions shall file and serve on or before July 17, 1967, a supplemental complaint setting forth in what respects it objects to the order in F.D. No. 21989 as this now stands and what further relief it seeks. In the absence of good cause shown at the said hearing we intend to dismiss with prejudice the complaint of any plaintiff or intervening plaintiff which has not filed such a supplemental complaint. Responsive pleadings shall be filed and served on or before July 27. Briefs of plaintiffs and intervening plaintiffs shall be filed and served by August 8, answering briefs by August 29, and reply briefs by September 12, 1967.

II

N&W, B&O, C&O, and Western Maryland have moved that the order entered in these actions on remand from the Supreme Court on April 28, 1967, should be modified by expanding the reference in paragraph 3 to the merger of PRR and NYC authorized by the ICC's orders in F.D. 21989, dated April 6 and September 19, 1966, so as to include the supplemental order on reconsideration served June 12, 1967. This motion must be considered in the context of the language in the same paragraph that the injunction should continue "pending the completion of the proceedings directed by the Supreme Court." The movants contend that such proceedings include not only proceedings for the judicial review of the order on reconsideration in the merger case, F.D. 21989, which we have discussed above,

but also the order of the same date in the N&W inclusion proceeding, F.D. No. 21510.

Three different positions as to our duty under the Supreme Court's mandate emerge from the briefs and argument. The movants' position, supported in considerable degree by the United States, is that the injunction must remain in effect until every phase of the orders in both dockets has been finally passed upon by the Supreme Court.[4] At the other end of the spectrum the Interstate Commerce Commission, the State of New York, PRR and NYC, and the Trustees of the New Haven (NH) contend that the Court's only *mandate* was to enjoin consummation until the *Commission* had finished its work in the two cases which the Court outlined, although they acknowledge our power to grant further relief on a proper showing and on conditions designed to insure the greatest possible expedition.[5] E-L and D&H seem to suggest a midway position, that although the Court expected an injunction during further judicial review of both orders, this was dependent on the achievement of expedition.

All these positions find some support in the majority opinion of the Court. The I.C.C. and others joining with it emphasize the Court's narrow statement of its holding, "We hold only that under the uncontradicted findings of the Commission it was necessary for it to conclude the inclusion proceedings, as to the protected railroads, prior to permitting consummation of the merger," and its equally narrow definition of the "sole question before it," 386 U.S.

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[4] Counsel for the United States reserved judgment on whether the injunction would have to continue during litigation only on the *terms* of inclusion; he thought "there might be some lattitude" on that score.

[5] It may be that the Trustees of NH do not join in the acknowledgment.

at 378; another statement which we quote in the margin;[6] and the concluding direction,

> "The judgment of the District Court is reversed and the cause is remanded with instructions that it be remanded to the Commission for further proceedings not inconsistent with this opinion." 386 U.S. at 392.

The parties favoring a broader injunction point in contrast to another passage which we quote in the margin[7] and, more particularly, to the third sentence.[8] Some of the opponents respond with the Court's remark that the N&W had "indicated its acquiescence" to inclusion of the three

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[6] "In view of the patent invalidity of the order permitting immediate consummation of the merger and in light of the present status of the litigation before the Commission, we can only conclude that it is necessary that the decision as to the future of the protected railroads and their inclusion in a major system be decided prior to consummation of the Penn-Central merger. This is especially true since the findings and recommendation of Commissioner Webb, as to the inclusion of the three protected railroads, are now under submission to the full Commission and a decision should be reached thereon by July or August 1967, we are advised by counsel. This short time would have little effect upon the ultimate consummation of the merger—which has been in the making for some 10 years now—and if it resulted in the future of the protected railroads being finally decided, serious losses to them would be obviated." 386 U.S. at 390.

[7] " . . . We note and give weight to the estimates of the Commission that the inclusion proceedings of the three roads in the N&W should be concluded in a 'relatively short time.' Our remand should therefore, entail only a very short delay before the Commission. If its order is attacked in court the hearing there can be expedited, as was this one, and an early determination made. We do not believe that this is too high a price to pay to make as certain as human ingenuity can devise, a just and reasonable disposition of this matter for all of the parties. After all, it is the largest railroad merger in our history and if not handled properly could seriously disrupt and irreparably injure the entire railroad system in the northeastern section of the country—to the great detriment not only of the parties here but to the public convenience and necessity of the entire Nation." 386 U.S. at 392.

[8] They also stress the language in the passage quoted in fn. 6 as to "the future of the protected railroads being finally decided."

roads, 386 U.S. at 383, and argue that whatever the Court may have said about review of an inclusion order was predicated on the assumption that N&W would not challenge the basic validity of such an order (as distinguished from the financial terms) as it has now done. N&W denies this; it says it only indicated acquiescence in an inclusion order upheld on judicial review, see 324 I.C.C. at 28, 148.

We find it unnecessary to decide among these contentions at the present time. Enough has already transpired to suggest that, even with a far greater degree of cooperation in carrying out the Supreme Court's instructions than has thus far been manifested, finalization of the inclusion order may prove a much longer and more complicated task than the majority anticipated. In addition to N&W's basic attack on the order, none of the four affected carriers except E-L is satisfied with the financial terms. There is also the possibility, already mentioned, that once these are finally set, rejection by E-L's stockholders would prevent inclusion of D&H and B&M, and rejection by D&H's would prevent the B&M's inclusion; a carrier suffering non-inclusion in N&W as a result of rejection by the stockholders of another would then be entitled to seek inclusion in the PRR-NYC system, with more hearings before the Commission and further judicial review. All this could take years. We do not read the Supreme Court's opinion as directing us here and now to issue an injunction for so long a period, which might have such serious consequences not only to the PRR and NYC and the public served by them but also to NH and the four states heavily dependent upon its service.

On the other hand we do not believe it would be proper to permit consummation of the merger without our hearing and determining objections to the supplemental order in the merger case, F.D. 21989, itself. Enjoining consummation until that time will truly involve a relatively short delay; indeed, if petitions for reconsideration filed in the inclusion case, F.D. 21510, should lead the Commission to postpone the effective date of the order in the merger case,

as to which we make no suggestion, there might be none at all. By the time we decide these actions in the early fall many things may be clearer than they now are. If we should determine that the revised protective conditions are satisfactory or require only minor modification and that the order is valid in all other respects, we would have seriously to consider whether the injunction should continue and, if so, how long, to what extent, and on what terms. In this connection attention would have to be given to the Court's observation "that should the immediate consummation of the merger be permitted and at a later date *neither* the interim conditions *nor* the inclusion proceedings be disposed of favorably to the continued existence of the merger, the only remedy remaining would be to set it aside and unscramble the consolidation." 386 U.S. at 391. (Emphasis supplied). This could well mean that once the propriety of the protective conditions was established, the merger might be allowed to be consummated and perhaps should be if the balance of interests suggested. On the other hand, if we should find the revised protective conditions invalid or the order unsound in other important particulars, a further injunction would doubtless be required.

We therefore modify paragraph 3 of our order of April 28, 1967, to read:

> "3. The orders of the Interstate Commerce Commission entered on April 6 and September 19, 1966, and served June 12, 1967, insofar as they authorize immediate consummation of the merger between the Pennsylvania Railroad Company and the New York Central Railroad Company are enjoined pending the final determination of these actions by this Court and thereafter for such further time, if any, and to such extent and on such terms as this Court may then direct. The period of 180 days fixed by the Commission in its order served June 12, 1967 for exercising the authority there conferred shall not begin to run so long as such injunction remains in effect."

In order to expedite determination whether a further injunction should be issued in our decision in the fall, all parties seeking such relief shall file and serve applications supported by appropriate affidavits and briefs not later than September 5, 1967, opposing affidavits and briefs shall be filed and served not later than September 14. We shall expect such affidavits to inform us as to the then status and future time-table of proceedings for review of the inclusion order (including the possibility of separate and expedited determination of the validity of the direction for inclusion, as distinguished from the terms); the grounds asserted for invalidating that order in whole or in part and the answers thereto; the views of the three protected roads and the United States whether and why a further injunction is needed;[9] the representations made to the Supreme Court as to judicial review of an inclusion order and of N&W's acquiescence in such an order; the then status of proceedings for the inclusion of NH in the PRR-NYC system and of the reorganization of NH under § 77 of the Bankruptcy Act; and any other relevant facts. We shall set a time for argument on such applications at the hearing heretofore directed.

The Clerk shall enter this as an order.

/s/ Henry J. Friendly
U.S.C.J.

/s/ Edward Weinfeld
U.S.D.J.

/s/ Richard H. Levet
U.S.D.J.

3 July, 1967.

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[9] We emphasize this since no injunction of the merger pending review of the inclusion order would seem to be justified in the interest of the N&W, and still less in that of the B&O, C&O or Western Maryland, which have joined in its motion; the interests that would justify a further injunction would be those of E-L, D&H and B&M and the communities they serve.

APPENDIX G

Memorandum on Motions of Trustees of Central Railroad of New Jersey, Boston & Maine Corporation, and City of Scranton and Milton J. Shapp.

I. The Trustees of the Central Railroad of New Jersey (CNJ) having represented in their motion "that they will not assert in any Court any claim that the Penn-Central merger should be delayed for any reason" and having stipulated in open court that, while reserving the right to assert that the order of the Interstate Commerce Commission should contain protective conditions for the benefit of CNJ they will not ask that the Appendix G conditions in favor of other carriers be set aside, their motions to be relieved from the requirements of our Memorandum Order of July 3, 1967, insofar as that order requires them to file any amended complaint on or before July 17, 1967, to file a brief by August 8, 1967, to file reply briefs by September 12, 1967, and to bring the action as to them to final hearing on September 18, 1967, is granted.

II. Boston and Maine Corporation having represented to this Court that its "primary interest is that the Penn-Central merger actually occur and not be so long delayed that it fails of consummation," its motion to withdraw its complaint as an intervening plaintiff and to be realigned as an intervening defendant is granted.

III. The motion of the City of Scranton and Milton J. Shapp, intervening plaintiffs, for a stay of further proceedings or in the alternative to permit dismissal of their complaint without prejudice is denied, for reasons indicated in our Memorandum Order of July 3, 1967. The movants have shown no sufficient cause why, having invoked the jurisdiction of this Court where this litigation has been centered, they should now be allowed to present the self-same issues to another district court which has thus far had no occasion to occupy itself with their problems. Taking note of the Memorandum sur Motions of Defendant and Interven-

ing Defendants for a Stay issued by the District Court for the Middle District of Pennsylvania in Borough of Moosic et al. v. United States of America et al., Civ. No. 10054, on July 13, 1967, this Court will grant the Borough of Moosic and the City of Pottsville leave to intervene in these actions as plaintiffs if application accompanied by a complaint is made on or before August 2, 1967. The time of the City of Scranton and Shapp to file a supplemental complaint is similarly extended. In the event of such intervention or the filing of such a supplemental complaint pleadings responsive thereto shall be filed on or before August 12, 1967. The schedules set forth in our Memorandum Order of July 3, 1967, shall be complied with in all other respects. The hearing scheduled for September 18, 1967, will begin at 9:30 A.M. at a courtroom to be assigned.

In accordance with the suggestion made by counsel for the Interstate Commerce Commission, we place the various plaintiffs and intervening plaintiffs on notice that they are responsible for seeing to it that the court is furnished with the portions of the record they deem relevant to the issues they desire to raise. We shall expect the Commission to cooperate fully in this regard.

HENRY J. FRIENDLY
U.S.C.J.

EDWARD WEINFELD
U.S.D.J.

RICHARD H. LEVET
U.S.D.J.

26 July, 1967

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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66 Civ. 2860

ERIE-LACKAWANNA RAILROAD COMPANY, *Plaintiff*

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *Defendants.*

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66 Civ. 2903

THE BALTIMORE AND OHIO RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, *Plaintiffs.*

v.

UNITED STATES OF AMERICA, *Defendant.*

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66 Civ. 2914

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and READING COMPANY, *Plaintiffs.*

v.

UNITED STATES OF AMERICA, *Defendant.*

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66 Civ. 2451

THE DELAWARE AND HUDSON RAILROAD CORPORATION, *Plaintiff.*

v.

UNITED STATES OF AMERICA, *Defendant.*

and

INTERSTATE COMMERCE COMMISSION, *Intervening Defendant.*

Memorandum on Motion for Injunction.

The United States of America and the Interstate Commerce Commission have moved this Court to enjoin

(1) the Norfolk and Western Railway Company from taking any further action in Civil Action No. 67-C-51-R, *Norfolk and Western Ry.* v. *United States,* before the United States District Court for the Western District of Virginia; and

(2) the City of Scranton and Milton J. Shapp from taking any further action in Civil Action No. 10054, *Borough of Moosic et al. v. United States,* before the United States District Court for the Middle District of Pennsylvania,

pending final determination of the instant actions by this Court.

For reasons indicated in our Memorandum Order of July 3, 1967, and in our order of today's date denying the motion of the City of Scranton and Shapp for a stay of 66 Civ. 2860 or for leave to dismiss their intervening complaint in that action without prejudice and on the basis of the authorities cited in the Memorandum in Support of the Motion, we entertain no doubt of the power and propriety of granting the relief sought by the United States and the Commission against them insofar as this relates to issues that can be litigated in the action in this court in which they have intervened, and we would do this if there were any evidence of need. However, the District Court for the Middle District of Pennsylvania has stayed proceedings in that court in Civ. No. 10054 until October 1, 1967, or further order of the court, and before that time we shall either have heard these parties in 66 Civ. 2860 or, if they should choose not to prosecute their intervening complaint, will have dismissed it with prejudice.

The portion of the motion asking us to enjoin the City of Scranton and Shapp from prosecuting so much of Civ. No. 10054 in the Middle District of Pennsylvania as relates to the inclusion order, and the N&W from prosecuting Civ. No. 67-C-51-R in the Western District of Virginia raises a closer question. While we have no desire to assume additional burdens, we must agree with the United States and the Commission, as the District Court for the Western District of Virginia also appears to do, that the "inclusion" case is sufficiently interrelated with the "merger" case that the public interest would be best served by their being handled by a single court of first instance, which is able to entertain both.[1] We agree also that the few days priority in time of the N&W's action in the Western District of Virginia with respect to the inclusion order over the D&H's

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[1] This is sufficiently evidenced by the N&W's motion that we enjoin the merger pending final determination of both the merger action and the inclusion action. In our Memorandum Order of July 3, 1967, we indicated that if we found the merger order valid our determination whether or not to enjoin the merger pending final determination of the inclusion proceeding might well depend on the nature and substantiality of the objections to the inclusion order—a problem in which the aggravated plight of the New Haven, see Judge Anderson's memorandum of July 11, 1967, may be of great importance. If we are seized of the inclusion action, we shall not have the embarrassment of being obliged to predict the views of another court. Also, as made clear by the Erie-Lackawanna's petition for reconsideration to the Commission in the merger case, the lack of a capital indemnity provision, a point that may well come before us in the merger case, is important only if N&W's objection to the inclusion order are sustained. Again an important basis for the Commission's rejection of N&W's principal objection to the inclusion order, namely, that this should be deferred pending consideration of its merger with C&O-B&O, was that such a postponement would further delay the Penn-Central merger, this ground would appear more weighty to a court which had satisfied itself of the validity of that merger than to one unfamiliar with it. We cite these simply as examples, not as an all inclusive list.

action in this court in which the B&M has intervened, although relevant, in not conclusive in determining what district court should review an order of the Interstate Commerce Commission. Compare Eastern Air Lines, Inc. v. C.A.B. 354 F. 2d 507, 511 (D.C.Cir.1965). While the N&W's winning the race would normally be a sufficient reason for deferring to the District Court for the Western District of Virginia, with the D&H and the B&M having the right to intervene there, if the inclusion order stood alone, this may not be so when review of the inclusion order in this court, equally feasible in light of our grant of the motion of the United States and the Interstate Commerce Commission to join the N&W, would have the advantage of bringing the merger order and the closely related inclusion order before the same court. With only questions of law at issue and with an appeal as of right to the Supreme Court the considerations that usually favor allowing the plaintiff that has won the race to the courthouse to retain his victory lose much of their force. Indeed, the Amended Pre-Trial Order of the District Court for the Western District of Virginia made clear that the continuance of the N&W's action "shall not be construed to preclude any party from applying to the District Court for the Southern District of New York for an injunction restraining the other parties from the further prosecution of this action."

However, here again we see no sufficient reason for now deciding whether we could or should grant the injunction that is sought. The District Court for the Middle District of Pennsylvania has stayed the action there as we have indicated, the two judges of the District Court for the Western District of Virginia who were present at the hearing on July 11 and signed the Amended Pre-Trial Order of July 14, 1967 were of the view that the issues in Civil Action No. 67-C-51-R should be litigated in this court, and our order of even date has provided for a hearing at what appears to be the earliest practicable time.

We shall therefore leave the motion for an injunction undecided, with leave to the United States or the Interstate Commerce Commission to bring it on for further hearing on five days notice if occasion therefore should arise.

HENRY J. FRIENDLY
U.S.C.J.

RICHARD H. LEVET
U.S.D.J.

EDWARD WEINFELD
U.S.D.J.

26 July, 1967

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE DELAWARE AND HUDSON RAILROAD CORPORATION, *Plaintiff*,

BOSTON AND MAINE CORPORATION, *Intervening Plaintiff*,

v.

UNITED STATES OF AMERICA, *Defendant*,
INTERSTATE COMMERCE COMMISSION, *Intervening Defendant*.

67 Civ. 2451

Memorandum on Motions to Set Schedule and to Join N & W.

The United States of America and the Interstate Commerce Commission have moved this Court to establish an expedited briefing schedule in this action; appended to their motion is a copy of the Amended Pre-Trial Order of the District Court for the Western District of Virginia in Norfolk and Western Railway Co. v. United States of America, Civil Action No. 67-C-51-R. We note the statement of the two judges signing this order that it appeared to them "that the issues raised in this action should be liti-

gated in the United States District Court for the Southern District of New York," and the continuance of the Virginia action for a hearing by the full court including that issue on September 26, 1967. We note also that in directing the continuance the court made clear that this "shall not be construed to prevent or delay consideration by the United States District Court for the Southern District of New York of all the issues raised in this action" and provided that "any party may file copies of the brief which it has filed on the same issues in the Southern District of New York in lieu of filing original briefs in this action."

In light of the evident belief of the two judges in the Western District of Virginia that we should go forward with this action and of the Supreme Court's mandate for expedited hearing and early determination, we think it is incumbent on us to set a schedule that will permit our deciding this action as soon as feasible. To that end it is

ORDERED that the parties observe the following schedule, which is identical with that established by the District Court for the Western District of Virginia:

(a) Plaintiff and intervening plaintiffs are directed to file any supplemental complaints on or before August 7, 1967, or 7 days following service of the order of the Commission on Petitions for Reconsideration, in Finance Docket No. 21510, *Norfolk and Western Railway Co. and New York, Chicago and St. Louis Railroad Co.—Merger, etc.*, whichever date is later.

(b) Defendant and intervening defendants are directed to file their answers, together with such additional pleadings as may be deemed proper, on or before August 14, 1967, or 14 days following service of the order of the Commission on Petitions for Reconsideration, whichever date is later.

(c) Plaintiff and intervening plaintiffs may file responsive pleadings if they deem it advisable on or before

August 21, 1967, or 21 days following service of the order of the Commission on Petitions for Reconsideration, whichever date is later.

(d) No additional motions or pleadings may be filed thereafter except by leave of court for good cause shown.

(e) Proposed exhibits, if any, must be filed with the Clerk of the court on or before August 21, 1967, or 21 days following the service of the order of the Commission on Petitions for Reconsideration, whichever date is later. Formal proof of exhibits will be waived unless objected to in writing on or before September 11, 1967, or 42 days following service of the order of the Commission on Petitions for Reconsideration, whichever is later.

(f) The brief of plaintiff and intervening plaintiffs should be filed on or before August 18, 1967, or 18 days following service of the order of the Commission on Petitions for Reconsideration, whichever date is later. The brief of defendant and intervening defendants should be filed on or before September 8, 1967, or 39 days following the service of the order of the Commission on Petitions for Reconsideration, whichever is later. Reply briefs, if any, should be filed on or before September 19, 1967, or 50 days following the service of the order of the Commission on Petitions for Reconsideration, whichever date is later. In the event the hearing is set at an earlier date, reply briefs should be filed on or before the hearing date.

The United States and the Commission have also moved for an order under F.R. Civ. P. 19(a) to join the Norfolk & Western as a plaintiff. We see no reason to doubt that such joinder comes within the words and the evident purpose of the greatly broadened provisions of the first sentence of amended Rule 19(a). We are not persuaded that the last sentence of the rule creates an obstacle; joinder of the N & W as an additional party plaintiff would not "render the venue of the action improper." Here venue rests on the act of the D & H in bringing this action and

the defendants' waiver of venue objection; joinder of an addition plaintiff does not defeat venue under 28 U.S.C. § 1398.[1] The motion is therefore granted on condition that such joinder shall not prejudice any contention the N & W may wish to make in any court that the Western District of Virginia is the appropriate forum for review of the inclusion order. Since, in addition to challenging the inclusion order, the Norfolk & Western will doubtless oppose the claims made by the Delaware & Hudson and the Boston & Maine, it may file an additional brief on that issue on or before the date fixed for the filing of briefs by defendants.

The D & H and the B & M also occupy a dual position, as plaintiffs attacking the adequacy of the consideration afforded by the Commission and as defendants answering the N & W's position that the consideration is excessive. Accordingly they also may file an additional brief as defendants answering any such arguments. If Erie-Lackawanna should seek intervention as a defendant, its application will be granted and it may file a brief as such.

On the assumption that the Interstate Commerce Commission will rule on the petitions for reconsideration by mid-August, the action is tentatively set for final hearing, see F.R. Civ. P. 65(a)(2), on September 28, 1967, at 10 A.M.

HENRY J. FRIENDLY
U.S.C.J.

EDWARD WEINFELD
U.S.D.J.

RICHARD H. LEVET
U.S.D.J.

26 July, 1967

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[1] The final sentence of the rule seems to have been framed in the light of the then venue provisions as to diversity actions, 28 U.S.C. §1391(a).

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 10054 Civil

BOROUGH OF MOOSIC, *Plaintiff*

v.

UNITED STATES OF AMERICA, *Defendant*

Brief of Plaintiff and Intervening Plaintiffs in Support of Motion to Vacate Stay

Preliminary Statement

It is clear that, unless this Court acts now to vacate its stay to permit the filing of briefs on both PRR-NYC and N&W Inclusion cases, plaintiff and intervening plaintiffs will be deprived of any effective judicial review of the public interest issues which they raise.

This conclusion is inescapable because the New York Court has separated the PRR-NYC case from the N&W Inclusion case by setting up separate hearing procedures which make it impossible to consider the interrelationship of one case to the other in passing upon the validity of the orders. This interrelationship is basic to the issues raised by these plaintiffs in this case. This interrelationship was emphasized by the United States Supreme Court in its decision in this case. This interrelationship has now been conceded by the I.C.C. and the U.S. Yet, the New York Court's hearing procedures do violence to this interrelationship and make it clear that plaintiff and intervening plaintiffs' theoretical right to litigate in New York is illusory and any attempt to enter the New York Court would be a vain and futile gesture. Moreover, the briefs now on record in New York demonstrate that the parties there have no intention of challenging the basic validity of both orders, which challenge is the central thrust of this action pending in the Middle District of Pennsylvania.

No one will be prejudiced by this court's permitting the filing in this court by these plaintiffs of combined briefs on the merits of the PRR-NYC and N&W Inclusion cases. Final decision on the stay can be postponed until the fall. The filing of briefs will not inconvenience or burden this court; will not interrupt the orderly hearing or disposition of the New York or Virginia cases; and will not inconvenience or burden the other railroad parties, since they will have the option of filing with this court the briefs they will have to prepare and file in any event in the other cases.

Summary of Argument

A summary of the changed circumstances which dictate the stay be vacated or modified are as follows:

1. The New York Court, in splitting two inextricably intertwined matters, has effectively precluded any meaningful judicial review in that forum by plaintiff or intervening plaintiffs herein.

2. The United States and I.C.C. now recognize that PRR-NYC and N&W Inclusion are inextricably intertwined.

3. The New York briefs are outside the scope of Moosic's case.

4. The New York Court does not assert jurisdiction over Scranton and Shapp with respect to N&W Inclusion.

5. This court, at the minimum, should modify its stay so as to permit the filing of briefs to avoid permanent injury to plaintiffs' rights.

6. The mandate of the United States Supreme Court for expedition requires that this court permit the filing of combined briefs.

7. Proposed Briefing Schedule.

Argument

I. The New York Court Has Adopted Procedures Which By Their Very Nature Deny the Substantive Rights of Plaintiff and Intervening Plaintiffs.

Without in any way deviating from its statutory right to have the Middle District of Pennsylvania determine whether Moosic is to become a one-railroad community, plaintiff and intervening plaintiffs wish to point out that it is crystal clear that the Southern District of New York, by its very procedure, has precluded their essential claims from ever being heard. We stress this point because this court's *per curium* memorandum sur motions to stay, dated July 13, 1967, placed great reliance upon anticipated developments in the New York Court.

A. *The Procedure Adopted by New York.* The New York Court has determined to hear the PRR-NYC merger separately from the N&W Inclusion case. Separate briefing and separate argument schedules have been set* That court anticipates that it will pass upon the validity of the PRR-NYC merger prior to its consideration of the N&W Inclusion orders, and that only the timing of the consummation of the former will be related to the latter. (S.D.N.Y., Memorandum Orders of July 3 and July 26, 1967).

Plaintiffs appreciate that the railroads involved in the New York action, being primarily concerned with financial arrangements, prefer that the two cases be tried separately. But this very separation of the two cases per se destroys a central core of Moosic's challenge to the two I.C.C. orders.

B. *The Denial of Moosic's Substantive Case.* The procedure adopted by the New York Court for separate treatment of PRR-NYC and N&W Inclusion prevents Moosic and

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* Petitions for reconsideration are pending at the I.C.C. in both PRR-NYC and in N&W Inclusion. The New York Court schedule has been fixed for PRR-NYC, whereas that for N&W Inclusion awaits a ruling by the agency prior to the commencement of a schedule by the New York Court.

other communities from realistically challenging the two I.C.C. orders. This arises because the validity of the PRR-NYC merger orders will be considered separately in New York, yet such merger can only be tested by reference to what it may directly inflict upon communities served by E-L and D&H. The total effect of the merger, however, is not of record in the PRR-NYC case. It is contained in the N&W Inclusion case, because it was only when E-L and D&H petitioned for inclusion in N&W that the total adverse impact of PRR-NYC came to light for communities served by E-L and D&H. It is therefore impossible to determine the validity of the PRR-NYC merger orders without simultaneously considering the N&W Inclusion orders. If PRR-NYC is litigated separate and apart from N&W Inclusion, then a court can only speculate as to whether the elements *not* considered by the Commission in PRR-NYC are material, and whether further hearings are necessary, or whether both cases should have been consolidated by the agency. One of the difficulties in seeking to set aside an agency order for failure to conduct an inquiry into certain phases of the public interest is a showing that certain matters are truly significant. Here we have important elements not considered in PRR-NYC. Are these matters truly important to warrant setting aside the PRR-NYC merger and remanding the case back to the agency? The damage revealed in the N&W Inclusion case provides important insight. It transforms Justice Brennan's theoretical discussion of what could happen into reality.

The prejudice to Moosic's case by hearing PRR-NYC and N&W Inclusion separately is obvious. Plaintiff was not a party to PRR-NYC before the agency. Not being served by PRR or NYC, it was totally unaware of the real impact upon the borough by the I.C.C.'s case-by-case handling of the eastern railroad mergers. It was only when the merger movement hit home, i.e., when E-L and D&H, both serving Moosic, petitioned for inclusion in N&W, that the Mayor and Solicitor of the borough instinctively reacted.

It was only then that the borough became involved. And the Commission's April 6, 1966, order in PRR-NYC was prior to the receipt of plaintiff's testimony in N&W Inclusion.

Justice Brennan's opinion is largely devoted to the impropriety of the case-by-case approach followed by the Commission. Moosic does have a substantive cause of action against both I.C.C. orders, and *the impact of the N&W Inclusion must be considered in evaluating whether PRR-NYC is in the public interest, not only in determining when PRR-NYC should be consummated.*

> "An inclusion may turn out to be impossible, either because of inability to work out equitable terms, a circumstance upon which inclusion orders have invariably been conditioned, or because upon full consideration the effects of the contemplated inclusion might be regarded as so detrimental that the proposed merger which made necessary the inclusion would be against the public interest." 386 U.S. at p. 405.

Since the New York Court is proceeding separately, if Moosic were to intervene there it could not realistically participate in PRR-NYC. When that court next turns to N&W Inclusion, Moosic would be in the situation of attacking the defensive action of its two carriers, E-L and D&H, who are seeking to protect themselves from the PRR-NYC merger.

The failure of the New York Court to treat both cases together destroys the only real basis for bringing both actions before a single court. The denial of Moosic's substantive right to set aside both orders would be prejudiced by such procedure.

The New York Court has not adopted the analysis of Moosic's action suggested by this court in its July 13, 1967 *per curiam* memorandum sur motions for stays, wherein it was stated inferentially that plaintiff might attack PRR-NYC and N&W Inclusion together in New York's PRR-

NYC proceeding. The New York Court, on July 26, 1967, considered Moosic's action as severable into a PRR-NYC component and N&W Inclusion component (See: Memorandum on Motions for Injunction). This analysis is a changed circumstance from what might have been contemplated by this court in imposing its stay.

II. The United States and I.C.C. Have Now Recognized That PRR-NYC and N&W Inclusion are Inextricably Intertwined.

The United States and Interstate Commerce Commission did not initially seek to have PRR-NYC and N&W Inclusion before a single three-judge court. It was only *after* Moosic attacked both orders on public interest grounds in a single proceeding in this court that these governmental agencies then sought to bring both orders to New York. But the New York Court has now determined to *hear* and to *decide* each case separately, so that no real purpose has been served in bringing both cases to New York except, perhaps, to give the appearance that the two cases have been brought together as they are in fact in the Middle District of Pennsylvania.

The I.C.C. has now admitted that the PRR-NYC and N&W Inclusion cases are so interrelated that they cannot be severed. We direct the court's attention to the joint I.C.C.-U.S. Memorandum filed July 20, 1967 in New York in support of an Injunction against City of Scranton and Milton J. Shapp*. This document terms PRR-NYC and N&W Inclusion to be "inextricably interrelated", "wholly interrelated", "completely intertwined", *and that this has been true with the agency since June,* 1964.

We thus submit that the Department of Justice can no longer oppose vacation of the stay in this court. It can no longer oppose Moosic's substantive cause of action from being heard, because it has conceded that a single cause of action, rather than two, are before this court.

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* Filed with this Court by our Memorandum of August 7.

III. The New York Briefs Are Outside the Scope of Moosic's Case.

This Court has before it four briefs filed August 8 in the Southern District of New York.* Three of these briefs are solely concerned with any hiatus between consummation of the PRR-NYC merger and final determination of N&W Inclusion. They do not attack the validity or merits of the merger itself.

Reading Company, alone, attacks any part of the merger order in any realistic respect. It does so on the ground that the agency failed to consider the impact of the merger upon Reading, or whether Reading will be able to survive the interim between consummation of the merger and Reading's inclusion in a major system without interim conditions, or whether Reading should be included in PRR-NYC if it is not included in C&O-B&O or N&W-C&O.

These limited grounds do not approach Moosic's complaint attacking the public interest findings of the merger on matters such as whether the Commission erred in its refusal to hold further hearings because of a stale record. (App. 4 to Moosic's Complaint); whether the Commission's basic economic forecast for the Eastern District is supported by substantial evidence or whether Witness Keyserling's testimony was properly discounted; whether the Commission's legal construction of the "public interest" proviso of Section (5)(2)(c) of the Act is valid (See: Opinion of Justice Douglas in *B&O R.R.* v. *United States),* among other matters.

There is no possible chance that there will be any duplication of issues on the PRR-NYC merger order between the Southern District of New York and the Middle District of Pennsylvania. If this Court does not vacate its stay, the largest corporate merger proposal in U.S. history will go without review at the District Court level.

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*These briefs were (1) E-L, (2) D&H, (3) Reading, and (4) jointly by B&O, C&O, N&W and WM.

Since this Court gave great weight to the matters which would be raised by the August 8 New York briefs in its *per curiam* memorandum of July 13, the meager contents of these briefs with respect to the essential validity of the merger order constitute a changed circumstance which provides a cogent reason for vacating the stay, at least to the extent of permitting the filing of a combined brief on PRR-NYC and N&W Inclusion.

IV. The New York Court Does Not Assert Jurisdiction Over Scranton and Shapp With Respect to N&W Inclusion.

The New York Court in its July 26, 1967, Memorandum on Motion for Injunction considers the N&W Inclusion orders separate from the PRR-NYC orders. *Scranton and Shapp have not intervened in the N&W Inclusion case in New York.* On this basis, the Middle District of Pennsylvania may clearly proceed with hearing the N&W Inclusion case. However, since N&W Inclusion and PRR-NYC are "inextricably interrelated", "completely intertwined" and "wholly interrelated," consideration of N&W Inclusion necessarily involves PRR-NYC. The orders in N&W Inclusion specifically provide for further consideration of the issues therein if PRR-NYC fails of consummation. We direct the attention of the Court to the joint U.S.-I.C.C. Memorandum in Support of Injunction filed July 20, 1967, in New York. The interrelationship of the two I.C.C. orders is particularly important for City of Scranton since it is not served by PRR or NYC, so that its basic attack on the merger is therefore in large part derivative through the adverse impact upon E-L, D&H and CNJ. The U.S. Supreme Court was aware of this. 386 U.S. at p. 384.

Since the New York Court in its July 26 memorandum clearly separates the Moosic case into two components, there is every reason for the Middle District of Pennsylvania to now vacate its stay.

V. This Court's Stay Must Be Modified to Permit the Filing of Briefs to Avoid Permanent Injury to Plaintiff's Rights.

Surely, permitting the filing of combined briefs is not, in the words of Justice Clark in *B.&O. R.R. Co.* v. *United States,* ". . . too high a price to pay to make as certain as human ingenuity can devise, a just and reasonable disposition of this matter for all of the parties". 386 U.S. at p. 392. Surely, this is the least this court can do to make sure that the communities represented in this case are treated fairly. The point is, this relief must be granted *now.* A month or two months from now will be too late for the permission to file briefs because then this court will never be able to catch up with the cases in New York or Virginia. Briefs must be filed here immediately to make it possible for this court to hear the case, or parts thereof, if at a later date the court should ultimately decide to hear the case. Only by setting a briefing schedule now will the court later be in a position to hear the case if it should decide to do so.

By permitting the filing of combined briefs now, this court will not injure or inconvenience any one. By not permitting the filing of briefs now, this court will very possibly be sanctioning damage and prejudice to the communities involved; will be denying them a forum for their grievances; and may render itself powerless to hear this case effectively at a later date. All concerned with this case must be ever mindful of the heavy burden of responsibility which this case entails, as stated by the Supreme Court: "After all, it is the largest railroad merger in our history and if not handled properly could seriously disrupt and irreparably injure the entire railroad system in the northeastern section of the country—to the great detriment not only of the parties here but to the public inconvenience and necessity of the entire Nation." Clark, J. 386 U.S. at p. 392. By permitting the filing of combined briefs now—which will not inconvenience or burden either this court, the other federal courts, or the parties—this court will go a long way toward avoiding a violation of Justice Clark's mandate.

This court owes at least as much consideration to Moosic and Scranton, its venue plaintiffs, as the Virginia Court has shown to its venue plaintiff, N&W, in permitting the latter to go ahead with its briefs in the Virginia action. As in Virginia, any party to the New York case should be permitted to file its brief with this court if it so desires.

VI. The Mandate of the United States Supreme Court for Expedition Requires That This Court Permit the Filing of Combined Briefs.

The Supreme Court has made it clear that expedition is mandatory in this case. For this court to decline to permit the filing of a combined brief now would effectively mean either that this court has no intention of ever reaching the merits of this case, in which event this court should so state now, so that plaintiffs know where they stand and may be guided accordingly, or that this court's ultimate consideration of the merits of the case will be delayed, and thus inconsistent with the Supreme Court's mandate for expedition. Obviously, an expedited hearing *later* can only be possible if this court prepares for this eventuality *now*. For example, if this court decides several months from now to hear this case, without moving ahead with briefs in the interim, months of delay will be experienced. Filing of combined briefs now is the only means of insuring expedition later.

VII. Proposed Briefing Schedule.

Plaintiff and intervening plaintiffs propose that this court adopt for the combined PRR-NYC and N&W Inclusion cases the identical pleading and briefing schedule adopted by the Virginia and New York Courts in their respective July 14 and July 26 orders for N&W Inclusion, with the exception that those portions of the agency record relied upon may be filed at the final hearing.

This schedule would commence seven (7) days after the issuance of the Commission's orders on reconsideration in

PRR-NYC and N&W Inclusion, whichever is later in time. This is the same schedule provided by the Virginia and New York Courts for N&W Inclusion.

Conclusion

For the foregoing reasons, this court should vacate its stay forthwith and establish a briefing schedule.

Oral hearing on this motion is requested.

Respectfully submitted,

CHRISTOPHER T. POWELL, *Solicitor*
Borough of Moosic
700 Mears Building
Scranton, Pa. 18503

HARVEY GELB, *Solicitor*
City of Scranton
City Hall
Scranton, Pa. 18503

LEON H. KEYSERLING
1001 Connecticut Ave., N.W.
Washington, D. C. 20036

GORDON P. MACDOUGALL
705 Ring Building
Washington, D. C. 20036

ROBERT P. CASEY
FRANK J. McDONNELL
Casey Haggerty & McDonnell
200 Mears Building
Scranton, Pa. 18503

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